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Elina Chechelnitsky

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NOTES

D&O INSURANCE IN BANKRUPTCY: JUST ANOTHER BUSINESS CONTRACT

*Elina Chechelnitsky**

INTRODUCTION

In July 2008, bankruptcy courts across the nation prepared themselves for a busy season.¹ As many as 5,664 companies sought to liquidate or restructure that month alone, a 57% increase from the prior year.² Just two months later, the largest corporate bankruptcy yet hit the world financial markets hard and swept away the lifetime investments of millions of businesses and individuals. The Lehman Brothers Chapter 11 bankruptcy case is valued at an astonishing \$6.9 billion,³ nearly

* J.D. Candidate 2009, Fordham University School of Law; B.S. *magna cum laude* (CPA Accounting) Leonard N. Stern School of Business, New York University, 2006. I would like to thank Professor Sean J. Griffith for contributing his expertise in D&O insurance law (which inspired the topic for this Note), guiding me through the research and writing process, and helping me consider every possible angle of my argument. I further thank Professor Susan Block-Lieb for contributing her bankruptcy expertise and for her care and patience during the final editing stages of this Note. I am deeply touched by and grateful for the countless hours that Morgan Stecher, the Senior Notes Editor, along with all other staff and editors of the *Fordham Journal of Corporate and Financial Law* have contributed. Lastly, I would like to dedicate my first legal publication to my parents, Michael and Galina, for their immeasurable support and sacrifices for my pursuit of the practice of law. The foregoing opinions, interpretations, conclusions and possible errors are solely my own, and can be addressed to me at elina@alumni.stern.nyu.edu.

1. See Catherine Chaskin, *Bankruptcy and D&O: Avoiding Crashes at the End of the Road*, RISK & INS., Oct. 1, 2008, <http://www.riskandinsurance.com/story.jsp?storyId=131255186>.

2. See *id.*

3. Bankruptcydata.com_20 Largest Public Company Bankruptcy Filings–2008, http://www.bankruptcydata.com/Research/Largest_2008.pdf (last visited Nov. 26, 2008).

matching the GDP of the Republic of Chad, and exceeding the GDPs of approximately sixty-one other countries.⁴ When the company's CFO, Richard S. Fuld Jr., stood before a Congressional panel on October 6, 2008, a Representative of Florida made the \$700 billion statement: "People want to know if you defrauded investors."⁵

Fraud, greed, and deception are common accusations with which investors stone the directors and officers ("D&Os") of failed corporations. After all, they were the ones who had run their companies into the ground, so should they not also bear the responsibility?

This Note looks behind the shield of D&O insurance and examines its treatment under the Bankruptcy Code (the "Code"). Part I provides an overview of the duties of directors and officers of a corporation, as well as the protections they receive under the business judgment rule and indemnification contracts. Part II explains the three different "sides" of D&O insurance policies. Part III discusses basic bankruptcy concepts including directors' and officers' duties in bankruptcy, automatic stay, and property of the estate provisions of the Code, as well as the treatment of contracts in bankruptcy. Part IV examines how bankruptcy law treats directors and officers, with a particular focus on the classification of D&O insurance policies and proceeds as property of the bankruptcy estate. Part V argues that D&O insurance should be treated as a business contract, the terms of which should not change the distribution scheme in bankruptcy, and that D&O insurance policies and proceeds should be included in the bankruptcy estate for the benefit of the creditors. This approach would not undermine the protections afforded directors and officers, who must feel comfortable taking business risks, because the business judgment rule will still afford them the necessary protections.

4. WORLD BANK, WORLD DEV. INDICATORS DATABASE, GROSS DOMESTIC PRODUCT 2007 (Sept. 10 2008), *available at* <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf>.

5. Bernie Becker & Ben White, *Lehman Managers Portrayed as Irresponsible*, N.Y. TIMES, Oct. 6, 2008, at B1, *available at* <http://www.nytimes.com/2008/10/07/business/economy/07lehman.html?em>.

I. DIRECTORS AND OFFICERS: THEIR DUTIES AND PROTECTIONS

The Duties of Directors and Officers

Directors and officers owe fiduciary duties of due care, good faith and loyalty⁶ to the corporations they serve⁷ as well as to the shareholders of those corporations.⁸ The duty of care requires directors and officers to conduct themselves as ordinary prudent persons would in similar situations.⁹ The duty of good faith requires directors and officers to act “in the honest belief that the action taken was in the best interests of the company.”¹⁰ The duty of loyalty calls upon directors and officers to avoid conduct that may injure the corporation or its shareholders.¹¹ Furthermore, it prohibits directors and officers from engaging in conduct that is solely in the interests of the directors or officers or other third parties.¹² In addition to these duties, there is also a duty of disclosure, which requires that the corporation “disclose fully and fairly all material information within the board’s control”¹³

The Business Judgment Rule

To determine whether directors and officers have satisfied their duties, courts apply the business judgment rule, which is a “presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”¹⁴ It is the shareholders’ burden to rebut this presumption when they challenge a decision made

6. *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1172 (Del. 2000).

7. *United Artists Theatre Co. v. Walton*, 315 F.3d 217, 231, n.14 (3d Cir. 2003); *Newby v. Enron Corp.*, 188 F. Supp. 2d 684, 704 (S.D. Tex. 2002) (“The relationship between a corporation’s officers and directors and the stockholders of that corporation has long been held to be fiduciary in nature.”).

8. *Newby*, 188 F. Supp. 2d at 704.

9. *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 746, n.402 (Del. Ch. 2005) (“[D]irectors must conduct themselves as ordinarily prudent persons managing their own affairs.” (quoting Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 40 (2005))).

10. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

11. D.J. Baker et al., *Corporate Governance of Troubled Companies and the Role of Restructuring Counsel*, 63 BUS. LAW. 855, 857 (2008).

12. *Id.*

13. *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1172 (Del. 2000).

14. *See Aronson*, 473 A.2d at 812.

by the board of directors.¹⁵ The shareholders must provide evidence that the directors breached “any one of the triads of their fiduciary duty – good faith, loyalty or due care.”¹⁶ If the shareholders fail to meet this burden, “the business judgment rule attaches to protect corporate officers and directors and the decisions they make, and our courts will not second-guess these business judgments.”¹⁷

The business judgment rule is intended to encourage directors and officers to take necessary business risks. The burden to rebut the rule’s presumption, therefore, is high. Moreover, even when the shareholders succeed and the court holds the directors and officers liable, they don’t always necessarily pay for their wrongdoing. Frequently, wrongdoing is indemnified by the corporation and is covered by D&O insurance.

Indemnification of Directors and Officers

Most states require corporations to indemnify their directors and officers for certain actions taken in their official capacities.¹⁸ Additionally, many corporations’ bylaws contain clauses requiring indemnification of directors and officers.¹⁹ In 2001, the Delaware Court of Chancery noted, “it has become common corporate practice to adopt mandatory indemnification and advancement provisions.”²⁰ Given that liabilities may be unpredictable, however, corporations typically protect themselves against indemnification claims by purchasing D&O insurance.

II. D&O INSURANCE

D&O insurance shields directors and officers from personal liability (except for criminal wrongdoing) that might arise during their tenure with the corporation.²¹ Insurance policies refer to allegations in claims

15. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993).

16. *Id.*

17. *Id.*

18. See David F. Heroy et al., *Fiduciary Duties of Officers and Directors of Financially Troubled Companies*, 906 PLI/COMM 1067, 1099 (2008).

19. See *id.* at 1100.

20. Gentile v. SinglePoint Fin., Inc., 787 A.2d 102, 106 (Del. Ch. 2001).

21. Matthew L. Jacobs et al., *Director and Officer Liability Coverage—The Basics*, 774 PLI/LIT 137, 143 (2008); AIG Specimen Policy 5 [hereinafter AIG Specimen Policy] (on file with author) (omitting criminal act from the definition of a “Wrongful Act”).

against directors and officers as “Wrongful Acts.”²² Generally the term has a consistent definition across most policies. AIG’s D&O policy, for example, defines a “Wrongful Act” as “any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission or act or any actual or alleged [e]mployment [p]ractices [v]iolation.”²³ With respect to executives in particular, the AIG policy defines a “Wrongful Act” as “any matter claimed against such Executive solely by reason of his or her status as such.”²⁴ Other policies have similar definitions.²⁵ By using such terminology, insurance policies are protecting directors and officers from liability that arises solely out of their status as such, as well as liability for actions they take in their corporate capacity.²⁶

There are three different types of D&O insurance coverage, known as Side A, Side B, and Side C. Each of these is discussed below.

“Side A” Coverage – Protection to the Individuals

Side A of the policy covers losses on behalf of the insured directors and officers when the corporation does not indemnify them.²⁷ Side A coverage typically applies in two situations: first, where the corporation does not indemnify its directors or officers because there is no indemnification agreement in place, the corporation refuses to indemnify, or the corporation does not have the means to indemnify due to insolvency (among other reasons).²⁸ Second, Side A covers “non-indemnifiable”

22. Jacobs et al., *supra* note 21, at 143.

23. AIG Specimen Policy, *supra* note 21, at 5.

24. *Id.*

25. Chubb Executive Policy 7 [hereinafter Chubb Policy] (on file with author) (defines “Wrongful Act” as “any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted, or allegedly committed or attempted by an Insured Person in his or her Insured Capacity . . . or . . . any other matter claimed against an Insured Person solely by reason of his or her serving in an Insured Capacity.”); The Hartford Policy 4 [hereinafter Hartford Specimen] (on file with author) (defines “Wrongful Act” as “any actual or alleged error, misstatement, misleading statement, act, omission, neglect or breach of duty, committed or attempted by the Directors and Officers, in their capacity as such . . . or any matter claimed against the Directors and Officers solely by reason of their serving in such capacity or in an Outside Position”).

26. Jacobs et al., *supra* note 21, at 143.

27. Sean J. Griffith, *Uncovering a Gatekeeper: Why the SEC Should Mandate Disclosure of Details Concerning Directors’ and Officers’ Liability Insurance Policies*, 154 U. PA. L. REV. 1147, 1164 (2006).

28. *See* Jacobs et al., *supra* note 21, at 144.

losses, such as those for which a corporation is barred by law from indemnifying directors and officers.²⁹ Compensatory damages, settlement amounts, and legal fees that the individual incurs while serving as a director or officer of the corporation are among the losses typically covered under Side A.³⁰

“Side B” Coverage – Protection for Indemnification

Side B of the policy reimburses the corporation for indemnifying its directors and officers.³¹ Side B does not insure the corporation for claims that are brought against it as an entity; rather, it covers only losses incurred by directors and officers that are in turn indemnified by the corporation.³²

Sides A and B appear to tip the scales of justice in the wrong direction – at least from the shareholders’ point of view. While in theory directors and officers should be held liable for their wrongful acts, insurance coverage enables them to avoid having to pay for those acts. First, Side A lowers directors’ and officers’ incentive to make careful decisions, because with their Side A insurance, they know they will not even have to pay for their own litigation costs. Side B ensures that the corporation does not lose money when it reimburses the directors and officers. Although it appears that both Sides A and B of the insurance benefit the directors and officers, purchasing of both sides of the policy created the issue of allocating fault when claims are brought against both the directors and officers and the corporate entity itself.³³ To resolve this conflict, Side C coverage was adopted.³⁴

29. *See id.*

30. *See* Griffith, *supra* note 27, at 1164.

31. *See id.* at 1165.

32. *See* Jacobs et al., *supra* note 21, at 145.

33. *See id.* The allocation problem arises when claims are brought against the directors and officers and the corporate entity itself, and there is uncertainty as to what portion of the total judgment should become directors’ and officers’ responsibility. *Id.* Thus, if the bulk of the judgment falls on the corporation, insurance coverage with only Sides A and B, which only cover the obligations of directors and officers, would benefit the insurer.

34. *See id.*

“Side C” Coverage – Protection to the Corporation

Side C reimburses the corporation for costs incurred while defending itself against securities claims or while settling or satisfying any related judgments.³⁵ With Side C coverage, any wrongs that may have been committed by the corporation’s directors and officers are, in a way, exculpated because they become fully subsidized by the third party insurer.³⁶

Big businesses can protect themselves against legal attacks with insurance – that is, while they are still in business. When big businesses stumble, however, and apply for bankruptcy protection they enter courts that use equitable standards, where many different parties seek a fair share of what is left in the pot. So what does and what should happen to D&O insurance policies and proceeds when a company files for bankruptcy protection? To answer this question, it is first necessary to examine the basic concepts of the Bankruptcy Code.

III. BANKRUPTCY LAW: AN OVERVIEW

The moment the bankruptcy clerk stamps “FILED” on a corporation’s bankruptcy petition, everything takes on a new shape and significance. Some promises lose meaning. Some creditors gain importance. Priorities shift. But amidst this whirlwind of change, a glimmer of possibility is created for everyone.

“Bankruptcy” is a word dreaded by many, but the fundamental idea behind it is benevolent. The most common of several different types of bankruptcy protection is a “liquidation bankruptcy,” or a Chapter 7 liquidation.³⁷ One of the main purposes of liquidation bankruptcy is the equitable treatment of creditors.³⁸ Without bankruptcy laws, creditors would be following state laws of “first in time is first in right,” which encourage creditors selfishly to race to seize the debtor’s assets while leaving other creditors empty-handed.³⁹ The Code forces creditors to

35. *See id.*

36. *See, e.g.,* Griffith, *supra* note 27, at 1168 (the goals behind the three sides of D&O insurance have a common purpose, which is “the shifting of risk from shareholder litigation, in whole or in part, from the corporation to a third-party insurer”).

37. *See* CHARLES JORDAN TABB, *THE LAW OF BANKRUPTCY* 2 (1997).

38. *See id.* at 3.

39. *See id.* at 4.

share the debtor's assets on a pro-rata basis, resulting in an equitable distribution of the debtor's property.⁴⁰

Chapter 11 of the Code is the business reorganization chapter. Through a Chapter 11 bankruptcy, a financially troubled business can restructure its finances so that "it may continue to operate, provide its employees with jobs, pay its creditors, and provide a return for its stockholders."⁴¹ This restructuring generally occurs when the court orders a deal between the debtor and the business's creditors, known as confirmation of the plan of reorganization.⁴² The courts' standards for confirmation include grounds for binding dissenting creditors within a class, and also possibly a dissenting class.⁴³

Creditors play a very important role in both the liquidation and reorganization chapters of the Code. If bankruptcy law aims to satisfy creditors, then the question arises: to whom do directors and officers owe fiduciary duties in bankruptcy, shareholders or creditors?

Directors' and Officers' Fiduciary Duties in Bankruptcy

Ordinarily, directors and officers owe fiduciary duties to the corporation and its shareholders, but not to the corporation's creditors.⁴⁴ The courts have generally taken the position that creditors negotiated their contractual rights to payment and are therefore protected by those rights.⁴⁵ When a corporation becomes insolvent, however, the fiduciary duties of its directors and officers expand to include not only the corporation's shareholders but also its creditors. Although courts have not yet defined the degree of this shift, they have indicated that the duties to the creditors become superior to the duties to the shareholders.⁴⁶ At that point, many states regard the insolvent corporation's assets as a trust fund for the benefit of the creditors.⁴⁷ This makes sense: when share-

40. *See id.*

41. *Id.* at 6 (quoting H.R. REP. NO. 595, 95th Cong., 1st Sess. 220 (1977)).

42. *See id.* at 806-07.

43. *See id.* at 807; *see also* 11 U.S.C. § 1141(d) (2009).

44. *See Heroy et al., supra* note 18, at 1072.

45. *See Simons v. Cogan*, 549 A.2d 300, 304 (Del. 1988).

46. *See Fed. Deposit Ins. Corp. v. Sea Pines Co.*, 692 F.2d 973, 976 (4th Cir. 1982); *Clarkson Co. v. Shaheen*, 660 F.2d 506, 512 (2d Cir. 1981); *see also Voest-Alpine Trading USA Corp. v. Vantage Steel Corp.*, 919 F.2d 206, 217 (3d Cir. 1990).

47. Many states adopt the "trust fund doctrine." *See Aldoro, Inc. v. Gold Force Int'l. Ltd.*, 859 N.Y.S.2d 154, 154-55 (N.Y. App. Div. 2008) (defining the "trust fund doctrine" as the theory "under which persons in control of an insolvent corporation

holders invest in a corporation, they do so hoping that the corporation will be well managed, will generate business and will make a profit. By buying stock, shareholders take on business risk.⁴⁸ Their investment may appreciate in value, but it may also decline. Creditors, on the other hand, lend money to the corporation with only one goal – to recover their money with interest. Although creditors also take on risk, they sign themselves up only for credit risk,⁴⁹ which is different in nature than business risk. While shareholders buy into the ongoing well-being of the business – and therefore “share” in the profits and losses – creditors buy into the company’s overall ability to repay regardless of whether the business is solvent.

What happens when the corporation becomes insolvent and files for bankruptcy? Several provisions of the Code make the moment of filing a very defining point.

Automatic Stay

Section 362(a) of the Code furthers the abovementioned goals of bankruptcy by imposing an “automatic stay” on all creditors. The stay arises when a company files a bankruptcy petition and prohibits creditors from coming directly after the debtor.⁵⁰ By preventing the creditors from rushing to beat each other to the debtor’s assets, the automatic stay gives the debtor breathing room at the peak of its financial distress.⁵¹ Unlike the principle of “first in time is first in right” in state collection laws, in bankruptcy, creditor claims must be

must hold the corporation’s remaining assets in trust for the benefit of its creditors”); *see also In re Picard*, 339 B.R. 542, 554 (Bankr. D. Conn. 2006); *In re Sheffield Steel Corp.*, 320 B.R. 423, 448 (Bankr. N.D. Okla. 2004); *In re Thomas*, 255 B.R. 648, 654 (Bankr. D.N.J. 2000); *In re Linderman*, 20 B.R. 826, 830 (Bankr. W.D. Wash. 1982).

48. “Business risk” is “[t]he risk that a company will not have adequate cash flow to meet its operating expenses.” Investopedia, Business Risk, <http://www.investopedia.com/terms/b/businessrisk.asp> (last visited Feb. 12, 2009). To meet its operating expenses, the company must be well managed. This explains why directors and officers, whose job it is to manage the company, owe fiduciary duties to shareholders who buy into business risk.

49. “Credit risk” is “[t]he possibility that a bond issuer will default, by failing to repay principal and interest in a timely manner.” Investorwords.com, Credit Risk, http://www.investorwords.com/1210/credit_risk.html (last visited Mar. 3, 2009).

50. *See* TABB, *supra* note 37, at 146.

51. *See id.*

administered in an orderly way under the supervision of the bankruptcy court.⁵²

The automatic stay is “neither absolute nor permanent.”⁵³ Some actions are excluded from the automatic stay, such as criminal actions against the debtor and tax liability audits by governmental units.⁵⁴ Where Congress has found state or other interests to be more important (such as the commencement or continuation of criminal actions or environmental actions), it has created exceptions to the stay.⁵⁵ The stay usually terminates when the reasons that brought it about no longer exist. For example, once the bankruptcy court confirms a plan, that plan becomes binding on all creditors and the property it deals with becomes free and clear of all claims and interests of creditors.⁵⁶ The stay also terminates against property that has ceased to be property of the bankruptcy estate.⁵⁷ Determining what constitutes property of the estate, however, is one of the great challenges in administering a bankruptcy case.

Property of the Estate

The filing of a bankruptcy petition, which marks the commencement of the bankruptcy case, automatically creates a bankruptcy estate.⁵⁸ The estate is viewed as a distinct legal entity, separate from the debtor.⁵⁹ The bankruptcy estate is comprised of all of the debtor’s property, with a few exceptions, as of the date the case is commenced.⁶⁰ In Chapter 7 liquidation cases, a bankruptcy trustee takes possession of the property and becomes the representative of the estate.⁶¹ In Chapter 11 cases, the debtor retains possession of estate property and becomes known as the “debtor in possession.”⁶² The debtor in possession assumes the duties of

52. *See id.*

53. *Id.*

54. For a list of exceptions, see 11 U.S.C. § 362(b) (2009).

55. *See* TABB, *supra* note 37, at 147.

56. 11 U.S.C. § 1141(a), (c).

57. *See* TABB, *supra* note 37, at 146.

58. *See* 11 U.S.C. § 541(a).

59. *See* TABB, *supra* note 37, at 271.

60. *See* 11 U.S.C. § 541(a)(1).

61. *See* TABB, *supra* note 37, at 271.

62. *See* DOUGLAS G. BAIRD, THE ELEMENTS OF BANKRUPTCY 13 (4th ed. 2006); 11 U.S.C. § 1107(a).

a trustee.⁶³ Both the trustee and the debtor in possession may use, sell, or lease the property of the estate in the ordinary course of business or subject to the court's approval.⁶⁴

The U.S. Constitution empowers Congress to enact bankruptcy laws and to define property within those laws.⁶⁵ Congress has defined "estate" as "all legal or equitable interests of the debtor in property as of the commencement of the case."⁶⁶ This language can be divided into three limitations on the scope of property of the estate:

- It must be considered "property";
- That belongs to the "debtor";
- That existed at "the commencement of the case."⁶⁷

Federal courts use state law concepts of property to assist them in defining "property of the estate," although state laws do not bind federal courts. The Code's legislative history suggests that Congress intended the meaning of "property" to be broad, and to include both tangible and intangible property.⁶⁸ It includes contingent property and property that the debtor may not be able to enjoy until the future.⁶⁹ In fact, "[u]nder the Code, creditors may be able to reach more assets in bankruptcy than they would have been able to reach outside of bankruptcy."⁷⁰

The second restriction on the property of the estate is that it must belong to the debtor. The same type of ownership the debtor had – whether it was fee simple, joint interest, leasehold, or legal title only – is transferred to the estate.⁷¹ Any debtor property that is in another party's possession when the case is commenced is also considered part of the estate.⁷² The Code requires that these third-party possessors turn such property over to the trustee.⁷³ If complications arise, the trustee may be

63. See BAIRD, *supra* note 62, at 13.

64. 11 U.S.C. §§ 363(b)-(c).

65. Bd. of Trade of Chicago v. Johnson, 264 U.S. 1, 10 (1924).

66. 11 U.S.C. § 541(a)(1).

67. See TABB, *supra* note 37, at 274.

68. Nw. Bank Worthington v. Ahlers, 485 U.S. 197, 208 (1988); *see also* TABB, *supra* note 37, at 274.

69. Segal v. Rochelle, 382 U.S. 375, 379 (1965).

70. See TABB, *supra* note 37, at 275.

71. *See id.* at 276.

72. 11 U.S.C. § 541(a) ("The commencement of a case . . . creates an estate. Such estate is comprised of [enumerated] property, wherever located and by whomever held . . .").

73. 11 U.S.C. §§ 542, 543.

able to recover this property from the possessor as per Code sections 542 and 543.⁷⁴ Only property to which the debtor holds legal title, as opposed to equitable title, can become property of the estate.⁷⁵

The third restriction is that only property belonging to the debtor at the time of the filing of the petition becomes property of the estate. Thus, any property the debtor had once owned, but no longer owns at the time of the filing, ordinarily does not become estate property. One exception is property that the trustee recaptures pursuant to his avoiding powers.⁷⁶ Certain other exceptions exist that are not relevant to this issue.

As previously stated, state laws define and regulate property rights.⁷⁷ Federal bankruptcy courts will thus follow state courts in interpreting these rights.⁷⁸ The difference between defining “property” and “property rights” is subtle but significant. The landmark case *Board of Trade of Chicago v. Johnson* illustrates this difference.⁷⁹ The issue in the case was the bankruptcy treatment of the debtor’s seat on the Chicago Board of Trade.⁸⁰ The United States Supreme Court held that although the seat qualified as “property” under the federal definition – and was therefore considered part of the estate – state law defined the nature of the property interest.⁸¹ According to Illinois state law, a seat on the Chicago Board of Trade could not be sold until all other exchange members’ claims against the debtor were entirely satisfied.⁸² Satisfaction of all those claims, however, meant no funds were available for the trustee to recover.⁸³ This case demonstrates that while federal law determines *which* property gets included in the bankruptcy estate, state law can distribute property *rights* in a way that would allow creditors to

74. See TABB, *supra* note 37, at 272.

75. See 11 U.S.C. § 541(d).

76. The trustee’s avoiding powers are defined in sections 544(a) and (b) of the Code, which give the trustee rights of hypothetical lien creditors and of actual creditors to set aside transfers that the debtor makes, while insolvent, for less than reasonably equivalent value or any transfers that delay, hinder, or defraud creditors. See BAIRD, *supra* note 62, at 112. Section 548 of the Code enables the trustee to reach back two years to recover any fraudulent conveyances.

77. See *Bd. of Trade of Chicago v. Johnson*, 264 U.S. 1, 10 (1924).

78. See *id.*

79. See *id.*

80. See TABB, *supra* note 37, at 275.

81. See *id.*

82. See *id.*

83. See *id.*

reach certain property that they otherwise would not have been able to reach under federal law.

Treatment of Contractual Rights in Bankruptcy

The Code generally recognizes contractual rights, but its treatment of contracts is complex.⁸⁴ Even where non-bankruptcy law does not recognize a breach of contract claim until an actual breach has occurred, the Code recognizes a right to payment and allows it to fall under the broad definition of a “claim.”⁸⁵ One court has noted that “Congress has deliberately defined ‘claim’ with broad strokes in order to ensure that ‘all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case.’”⁸⁶ Courts generally respect contractual rights in bankruptcy, but the automatic stay freezes all actions against the debtor, including all contract actions.⁸⁷ Furthermore, the Code gives the trustee power to assume or reject any executory contract, any contract that has not yet been performed, or any unexpired lease of the debtor, subject to the court’s approval.⁸⁸ These trustee rights exist irrespective of the amount of time remaining on the contract or whether it is fully executory or partially executed.⁸⁹ The trustee may assume and assign the contract even if it contains provisions that prohibit, limit, or otherwise restrict assignment.⁹⁰

With this background in mind, we now return to the moment when a corporation files for bankruptcy protection. Given that a corporation is a “person” as defined by the Code,⁹¹ when it files for bankruptcy these rules apply: creditors are stayed from exerting collection efforts pending a discharge, and any property belonging to the corporation becomes property of the estate. But how are the corporation’s directors and officers treated in this situation – does the stay apply to them as well? How are their D&O insurance contracts affected?

84. 31 RICHARD A. LORD, WILLISTON ON CONTRACTS § 78:7 (4th ed. 2008).

85. *See id.*

86. *Id.*

87. *See id.*

88. *See id.* § 78:26.

89. *See id.*

90. *See id.*

91. *See* 11 U.S.C. § 101(41) (2009).

IV. TREATMENT OF DIRECTORS AND OFFICERS IN BANKRUPTCY

Application of Automatic Stay to Directors and Officers

Usually the automatic stay provisions apply to the debtor corporation, and not to its directors and officers.⁹² One bankruptcy court has ruled, however, that for automatic stay relief to be available to non-debtor parties, “there must be ‘unusual circumstances’ and certainly ‘something more than the mere fact that one of the parties to the lawsuit has filed a Chapter 11 bankruptcy must be shown’”⁹³ The “unusual situation” arises when the debtor corporation and the third-party defendants (the directors or officers) have blended into one entity as a result of their actions, such that a judgment against the third-party defendant in effect becomes a judgment against the debtor corporation.⁹⁴ This view, known as the *Robins* doctrine, is not widely applied in all circuits. The *Robins* doctrine is supported by the Third and Fifth Circuits, as well as some lower level courts.⁹⁵ It has been rejected by the Ninth Circuit on grounds that “unusual circumstances” are not supported by the express language of the Code.⁹⁶ Yet at least one court in the Ninth Circuit that examined the issue in the context of Chapter 11 cases has ruled that lawsuits against the corporate management may be enjoined where such suits divert the management’s attention from the reorganization efforts.⁹⁷

Because the automatic stay provision does not apply to directors and officers in the same way that it does to the debtor corporation, it seems natural that directors’ and officers’ property would not be treated the same as the debtor corporation’s property. But, as the following section shows, this is not always true.

D&O Insurance Policy as Property of the Estate

The determination whether a D&O insurance policy is property of the bankruptcy estate is pivotal. If such a policy is not estate property, then upon the filing of a petition, directors and officers may be able to

92. See Heroy et al., *supra* note 18, at 1101.

93. A.H. Robins Co. v. Piccinin, 788 F.2d 994, 999 (4th Cir. 1986).

94. See *id.*

95. See Heroy et al., *supra* note 18, at 1101.

96. See *id.* at 1102.

97. See *In re Circle K Corp.*, 121 B.R. 257, 262 (Bankr. D. Ariz. 1990).

initiate action to gain control of the funds. If the policy is part of the estate, however, then it is subject to the automatic stay⁹⁸ just like all other property of the debtor.

In general, insurance policies and debtors' rights under such policies are considered to be property of the bankruptcy estate.⁹⁹ No Congressional definition of "estate property" has ever explicitly included D&O insurance policies, but a large number of cases have held that debtor-purchased insurance policies are indeed property of the bankruptcy estate.¹⁰⁰ Some of these courts have relied on the expansive nature of the Congressional definition of "property."¹⁰¹ A few others have focused on "who is the named insured" under the policy,¹⁰² or whether the debtor's estate has a greater value with the policies than without the policies.¹⁰³ Lastly, courts have considered the debtor's right as stated in the policy to receive and keep the insurance proceeds when the insurer paid out on a claim.¹⁰⁴

Whether the courts' use of each of the aforementioned factors is appropriate should be addressed separately for each factor. First, the definition of "property" has in fact been regarded as very broad.¹⁰⁵ Second, determining whether policies belong to the bankruptcy estate based on who is insured, though appearing to make sense, is rarely a factor at all. The vast majority of corporations do not purchase only Side A coverage;¹⁰⁶ most corporations purchase Side A in combination with

98. See TABB, *supra* note 37 and accompanying text.

99. See COLLIER ON BANKRUPTCY ¶ 541.10 (15th ed. rev.).

100. See, e.g., *In re Louisiana World Exposition, Inc.*, 832 F.2d 1391, 1399-1400 (5th Cir. 1987); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1001 (4th Cir. 1986); *In re Minoco Group of Cos. Ltd.*, 799 F.2d 517, 519 (9th Cir. 1986); *In re Laminate Kingdom LLC*, 2008 WL 1766637, at *2 (Bankr. S.D. Fla. 2008); *In re Allied Digital Techs. Corp.*, 306 B.R. 505, 509 (Bankr. D. Del. 2004); *In re Johns-Manville Corp.*, 40 B.R. 219, 230 (S.D.N.Y. 1984); see also Heroy et al., *supra* note 18, at 1104.

101. See *Johns-Manville*, 40 B.R. at 230 ("That insurance falls within the scope of the Debtor's 'property' is suggested by the expansive fashion in which property has been defined generally under the Code"); *A.H. Robins*, 788 F.2d at 1001 ("The scope of . . . ['property' in section 541(a)(1)] is broad." (quoting *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205, n.9 (1983))).

102. *Laminate Kingdom*, 2008 WL 1766637, at *2; *Allied Digital*, 306 B.R. at 511.

103. *Laminate Kingdom*, 2008 WL 1766637, at *2.

104. See *id.*

105. See *supra* notes 72-73 and accompanying text.

106. See TOWERS PERRIN, 2007 DIRECTORS AND OFFICERS LIABILITY SURVEY OF INSURANCE PURCHASING AND CLAIM TRENDS 19, available at http://www.towersperrin.com/tp/showdoc.jsp?country=global&url=Master_Brand_2/USA/News/Spotlights/

Side B, and sometimes Side C. In most cases, therefore, the debtor itself would be insured under the D&O insurance, and hence this factor almost inevitably qualifies D&O policies as property of the bankruptcy estate. Third, the debtor's estate is almost always worth more with the assets than without. This consideration rarely, if ever, yields a negative result because a purchased insurance policy is usually counted as an asset on the balance sheet. This is an empty factor considered by the courts. Fourth, a consideration of who keeps the insurance proceeds has engendered much controversy in the bankruptcy context. The following section will discuss each of these factors in more detail.

D&O Insurance Proceeds as Property of the Estate

Corporations can purchase insurance coverage in various combinations; courts usually determine whether insurance proceeds are property of the bankruptcy estate based on which combination is chosen. The only scenario in which courts generally agree on the treatment of insurance proceeds is where the corporation purchases only Side A coverage, thus covering only the directors and officers of the corporation. In these situations courts consistently rule that the proceeds are not property of the bankruptcy estate.¹⁰⁷ Disagreements arise, however, when the corporation purchases more than one side of insurance coverage.

When corporations purchase both Side A and Side B coverage, courts have taken divergent approaches. Many courts have held that the proceeds are not property of the bankruptcy estate, thus enabling directors and officers to collect insurance proceeds.¹⁰⁸ These courts rooted their reasoning in the automatic stay provision of the Code: if the D&O proceeds are deemed to be outside of the bankruptcy estate, then the automatic stay does not preclude an insurer from providing these proceeds to a covered director or officer, thereby providing directors and

2008/2008_06_11_CompaniesRelyOnUSDandO.htm. The survey shows that in 2007, out of the 2,828 companies surveyed, on average 9% within each industry type purchased only Side A coverage. Approximately 2% of all participants in the survey had only Side A coverage.

107. See *Allied Digital*, 306 B.R. at 512 (“[W]hen the liability insurance policy only provides direct coverage to the directors and officers the proceeds are not property of the estate.”); *Laminate Kingdom*, 2008 WL 1766637, at *2 (“Typically, the proceeds of a directors and officers liability insurance policy are not considered property of a bankruptcy estate.”).

108. See *Jacobs et al.*, *supra* note 21, at 152; see, e.g., *In re Louisiana World Exposition, Inc.*, 832 F.2d 1391, 1393, 1401 (5th Cir. 1987).

officers access to the coverage available to them.¹⁰⁹ Some courts have ruled the opposite, however, holding that mere coverage of the debtor by the policy is enough to consider the proceeds of both sides A and B to be property of the estate.¹¹⁰

Several courts have considered the classification of proceeds irrespective of whether they would ultimately reach the directors and officers. In deciding whether Side B indemnification proceeds (which would go to the corporation) should be considered property of the estate, courts have looked to whether the debtor had made any payments for which it would be entitled to indemnification coverage. Where the debtor had not made such payments, the proceeds were not considered part of the estate.¹¹¹ The Southern District of New York in *In re Adelpia Communications Corp.* analogized this situation to “a car owner with collision coverage claiming he has the right to proceeds from his policy simply because there is a prospective possibility that his car will collide with another tomorrow.”¹¹² The court pointed out that, regardless of the corporation’s bankruptcy, the trustee could not reach out into *potential* insurance proceeds. Furthermore, D&O insurance policies usually have a limit that, when reached, makes additional proceeds unavailable for reimbursement to the corporation.¹¹³ If potential indemnification proceeds were part of the estate, then the debtor corporation would have claim to funds to which it is not yet entitled, meanwhile leaving less in available proceeds to the directors and officers. Even if the aggregate amount of the proceeds does not diminish, the corporation may have a disincentive to indemnify the directors and officers if it knows that it will not get its Side B proceeds. Thus, it appears that the general policy

109. See Jacobs et al., *supra* note 21, at 152.

110. *In re Jasmine, Ltd.*, 258 B.R. 119, 128 (Bankr. D.N.J. 2000) (finding that the debtor’s interest in indemnification proceeds of its insurance policy was sufficient to consider the entire policy as property of the bankruptcy estate); *In re Sacred Heart Hosp. of Norristown*, 182 B.R. 413, 420 (Bankr. E.D. Pa. 1995) (“Proceeds available for the Debtor’s liability exposure are not segregated from the proceeds available to the directors and officers. Thus, the Debtor is indeed an insured and has a sufficient interest in the Proceeds as a whole to bring them into the estate.”).

111. See *Allied Digital*, 306 B.R. at 512 (“[W]hen the liability policy provides the debtor with indemnification coverage but indemnification either has not occurred, is hypothetical, or speculative, the proceeds are not property of the bankruptcy estate.”); *In re Adelpia Commc’ns Corp.*, 298 B.R. 49, 53 (S.D.N.Y. 2003).

112. *Adelpia*, 298 B.R. at 53.

113. See Heroy et al., *supra* note 18, at 1106 (discussing *In re Johns-Manville*, 33 B.R. 254, 264 (Bankr. S.D.N.Y. 1983)).

behind these types of cases is to protect directors and officers and to prevent the depletion of insurance proceeds. In another case, the bankruptcy court stayed the actions against the directors and officers, thus preventing the depletion of these insurance proceeds.¹¹⁴

The result changes where the corporation purchases both Side A and Side C coverage, whether or not Side B is procured. This combination gives coverage both to directors and officers and to the debtor corporation itself. In this situation the directors and officers and the debtor corporation directly compete with each other for the limited proceeds. Some courts have held that the proceeds may be considered property of the estate if the depletion of the proceeds through payments to directors and officers would have an adverse effect on the estate because such payments would result in insufficient coverage for the debtor.¹¹⁵ Yet there are still courts that take a more conservative debtor-centered approach and find that if the debtor is at all insured by the policy then all of the proceeds are property of the estate.¹¹⁶

Once proceeds are considered to be a part of the bankruptcy estate, they can no longer be property of the directors and officers. One of the fundamental principles of bankruptcy is the equal distribution of estate assets among all creditors.¹¹⁷ Thus, all estate assets are pooled together to be distributed among all creditors according to the bankruptcy distribution scheme.¹¹⁸ Certain claims receive priority and are paid before general unsecured claims, while other claims are subordinated.¹¹⁹ The rationale behind giving some claims priority is usually rooted in social, economic, or political policy considerations.¹²⁰ The only thing that directors and officers can do at this point is file a proof of claim for their unsecured claim with the bankruptcy court and hope that they can get

114. See *In re Johns-Manville Corp.*, 40 B.R. 219, 264.

115. See *In re Laminate Kingdom LLC*, 2008 WL 1766637, at *3 (Bankr. S.D. Fla. 2008); *Allied Digital*, 306 B.R. at 512 (“[W]hen there is coverage for the directors and officers and the debtor, the proceeds will be property of the estate if depletion of the proceeds would have an adverse effect on the estate to the extent the policy actually protects the estate’s other assets from diminution.”).

116. See, e.g., *In re Sacred Heart Hosp. of Norristown*, 182 B.R. 413, 419-20 (Bankr. E.D. Pa. 1995) (finding that where the debtor is also insured it has sufficient interest in the insurance proceeds that overrides other interests).

117. See COLLIER ON BANKRUPTCY, *supra* note 99, at ¶ 1.01.

118. See *id.* ¶ 507.02.

119. See *id.*

120. *Id.*

the highest distribution on the dollar – there are, of course, no guarantees.

Commentators and Courts Suggest to Protect Directors and Officers

Articles and commentaries that have addressed this subject suggest various solutions to the problem of keeping D&O insurance proceeds separate from other bankruptcy estate property. Some critics have suggested purchasing Side A only policies, which would practically eliminate any arguments for treating the proceeds as property of the estate.¹²¹ Another proposal would include a “priority of payments” provision in the insurance contract, which would specify the order in which the different sides of the insurance are to be paid out.¹²² Usually such payment priority terms require that directors and officers be paid first under Side A of the policy, followed by Side B, and then Side C.¹²³ This type of payout scheme helps resolve the ambiguity as to whether D&O proceeds under Side A should be part of the estate, given that the parties have already contemplated that the entity should be third in the order of the payouts.¹²⁴

Commentators also suggest limiting the reach of the bankruptcy trustee or debtor in possession. A common issue that emerges in the bankruptcy context is the insured v. insured exclusion.¹²⁵ This exclusion “bars coverage for claims brought against the directors and officers by the company, other directors and officers, or their agents or assigns.”¹²⁶ Courts are split as to whether such an exclusion would bar coverage for actions brought by the bankruptcy trustee or debtor in possession against the directors and officers.¹²⁷ To address this problem, some recommend including language in the policies that expressly excludes claims by the bankruptcy trustee from the reach of the insured v. insured exclusion.¹²⁸

As commentators have offered suggestions for how to protect D&O

121. See Chaskin, *supra* note 1; Jacobs et al., *supra* note 21, at 153.

122. See Chaskin, *supra* note 1, at 3; Jacobs et al., *supra* note 21, at 152.

123. See Jacobs et al., *supra* note 21, at 152.

124. See *id.*

125. See *id.* at 153; DANIEL J. STANDISH & H. JASON GOLD, WILEY REIN & FIELDING LLP, D&O INSURANCE ISSUES IN BANKRUPTCY 2 (2002), available at <http://www.wileyrein.com/docs/publications/11650.pdf>.

126. Jacobs et al., *supra* note 21, at 153.

127. See *id.*

128. See *id.*

insurance proceeds from becoming part of the bankruptcy estate, courts have also indicated that protecting the directors and officers of a corporation should remain a primary goal. In the widely-cited bankruptcy court opinion *In re Adelpia Communications Corp.*, Judge Gerber carefully noted that “if directors and officers are to serve, they need to have comfort in knowing that bankruptcy courts will not deprive them of contractual rights under the D&O policies upon which they may have relied in agreeing to serve.”¹²⁹ Another court that ruled against finding D&O policies to be property of the estate has explained that “D&O policies are obtained for the protection of individual directors and officers. Indemnification coverage does not change this fundamental purpose.”¹³⁰ Other courts, regardless of their final ruling, have used similar language.¹³¹ At least one bankruptcy court has ruled that awarding first priority to Side A coverage in a “Priority of Payments Endorsement” of the policy was sufficient to exclude D&O proceeds from the property of the estate.¹³²

The consensus is clear: both courts and commentators are concerned with protecting directors’ and officers’ contractual rights under the insurance policies. It is therefore natural to expect that future negotiation of D&O policies will reflect careful planning to ensure that directors and officers are adequately protected in bankruptcy.

V. WHO REQUIRES GREATER PROTECTION, D&OS OR CREDITORS?

Directors and officers owe fiduciary duties to the corporations they serve,¹³³ providing a protective shield to the shareholders. Of course, the possibility exists that directors and officers may make honest miscalculations – simple, unforeseeable errors in business judgment.

129. 285 B.R. 580, 598 (Bankr. S.D.N.Y. 2002).

130. *In re First Cent. Fin. Corp.*, 238 B.R. 9, 16 (Bankr. E.D.N.Y. 1999).

131. See, e.g., *In re Medex Reg’l Labs., LLC*, 314 B.R. 716, 721 (Bankr. E.D. Tenn. 2004) (“[I]t is important for the court to remember the purpose behind a directors’ and officers’ policy: ‘D&O policies are obtained for the protection of individual directors and officers.’” (quoting *In re Youngstown Osteopathic Hosp. Ass’n*, 271 B.R. 544, 550 (Bankr. N.D. Ohio 2002))); *Youngstown*, 271 B.R. at 550 (“While [the corporation] is the named insured on the policy, the policy is for the benefit of the directors and officers.”).

132. See *In re Laminat Kingdom LLC*, 2008 WL 1766637, at *3 (Bankr. S.D. Fla. 2008).

133. See *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1172 (Del. 2000).

After all, no one could have foreseen that a series of business decisions would cause a company such as General Motors to consider filing for bankruptcy protection.¹³⁴ Unquestionably, it would be unfair to punish honest directors and officers who simply miscalculate business risks. Fortunately, the business judgment rule protects directors and officers in situations where they do not intend to defraud investors.¹³⁵

Sometimes, however, directors and officers exceed the bounds of mere miscalculated business decisions, and instead are negligent, careless, or irresponsible. In such cases the law does not protect the directors and officers. Luckily for them, they can protect themselves with D&O insurance. D&O insurance does more than simply provide coverage for directors and officers to make up for a corporation's unreasonable copout provisions in the indemnification contract; it also reimburses directors and officers even when they negligently breach their fiduciary duties. The problem remains that directors and officers as individuals ultimately do not pay for their own wrongdoing.

On the one hand, D&O insurance arrangement seems appropriate, given that directors and officers, on behalf of the corporation, negotiated their contracts with the insurance companies and equitably paid insurance premiums in exchange for "get out of jail free" cards. On the other hand, the funds used to pay these premiums come from the corporation, and ultimately from the shareholders. So in essence, the shareholders are forced to pay for giving up the fiduciary duties owed to them – there seems to be something inherently unfair in this exchange. Nevertheless, it can be argued that because shareholders take on business risk, they knowingly make the business decision of purchasing insurance and hedging themselves against the default of their directors and officers. If shareholders had not purchased the insurance, then directors and officers might not have agreed to serve the corporation. Shareholders make a business decision to contract away their right to justice.

When a corporation files for bankruptcy, the provisions of the Bankruptcy Code start controlling the priorities of distribution of the debtor's assets. The Code allows for ordinary business to continue during the administration of the bankruptcy case only to the extent that it promotes the primary goal of treating the creditors equitably.¹³⁶ The

134. See Ted Reed, *Bailout, Bankruptcy or Both for Big Three?*, THESTREET.COM, Nov. 25, 2008, <http://biz.yahoo.com/ts/081125/10449964.html?.v=1>.

135. See *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

136. See TABB, *supra* note 37 and accompanying text.

creditors of a corporation become prominent players in the bankruptcy context. Because the creditors took on credit risk and not business risk, they are primarily interested in receiving the value of what is owed to them. Shareholders, on the other hand, are primarily interested in the continued functioning of the business. When faced with these potentially conflicting interests, bankruptcy courts should remember that in bankruptcy, the fiduciary duties of directors and officers are expanded to include creditors, and not just the shareholders.

When bankruptcy courts consider the classification of D&O *policies* as property of the debtor's estate, it appears that three out of the four factors used almost guarantee that the policies become property of the estate.¹³⁷ When courts consider whether D&O insurance *proceeds* are property of the estate, however, their opinions are split. When the corporation purchases Side A and Side B coverage, the most reasonable approach is to consider whether the corporation has actually indemnified the directors and officers. This approach properly encompasses in the bankruptcy estate only that which should rightfully be paid to the corporation, thereby giving no special deference to directors and officers. When the corporation purchases Side A and Side C of the policy, the courts should continue to respect the priority of the corporation's creditors over its directors and officers, and regard the insurance proceeds as part of the bankruptcy estate.

An issue arises where bankruptcy courts concede in their opinions that directors and officers should be protected, and scholarly articles then offer advice on how to keep D&O insurance proceeds separate from the debtor's estate. But should directors and officers be protected at all in bankruptcy? Outside of bankruptcy directors and officers are shielded by the business judgment rule and shareholders purchase D&O insurance for judgments that cannot be protected by the business judgment rule. When a corporation files for bankruptcy, however, protecting directors and officers should no longer be the main focus – they have already brought the corporation to the ultimate failure, why should they receive further protection? Even if corporations insert protective provisions into their D&O insurance contracts, such as the “priority of payments” provision, bankruptcy courts should uphold the Code's equitable approach and reject attempts to circumvent the bankruptcy priority scheme. Such provisions are comparable to contracts in which one party contracts not to be sued. Such contracts would simply be unenforceable.

137. See discussion *supra* Part IV, D&O Insurance Policy as Property of the Estate.

Similarly, contracting to circumvent the bankruptcy distribution scheme should be discouraged. Because D&O insurance in itself does not seem to promote justice, but rather is merely a business arrangement, there should be no place for it in a court of equity.

D&O insurance is a business contract. In bankruptcy, however, business contracts are administered according to the provisions of the Code to satisfy creditors and relieve the debtor. Although directors and officers need to know that they are protected when prudent business judgments go wrong, when a corporation files for bankruptcy the business judgment rule should be their only protection. To make up for lack of protective insurance, bankruptcy courts should allow corporations to pay for the directors' and officers' attorneys' fees to provide them with adequate representation and to avoid deterring them from serving their corporations. Still, the protection of directors and officers should not take priority over the corporation's creditors, who would prefer to see the corporation gain access to the proceeds of its Side B and Side C coverage, even if it comes at the expense of directors' and officers' access to Side A coverage. Bankruptcy courts can correct the injustice of D&O insurance by giving the corporation access to the insurance proceeds while permitting the directors and officers to make general unsecured claims against the corporation. If bankruptcy courts stop signaling that the protection of directors and officers is a major priority, then perhaps fewer directors and officers will be negligent in their business decisions, knowing that they will ultimately be responsible for these decisions should their companies file for bankruptcy.